87-122

No. [redacted]

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEE A. MOSCO, JR.,

Petitioner,

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the grant of a directed verdict in a Federal Employers' Liability Act and Boiler Inspection Act case violates the Seventh Amendment to the United States Constitution?

II. Whether the District Court and Fourth Circuit Court of Appeals, respectively, correctly entered and affirmed the directed verdict in favor of The Baltimore and Ohio Railroad Company where the undisputed facts established as a matter of law that the B&O did not violate the Federal Boiler Inspection Act?

STATEMENT OF PARTIES TO THESE PROCEEDINGS

The Petitioner, Lee A. Mosco, Jr., an employee of The Baltimore and Ohio Railroad Company, at all relevant times, was the plaintiff and appellant below.

The Baltimore and Ohio Railroad Company ("B&O") was the defendant and appellee in the proceedings below. The B&O was dissolved effective April 30, 1987, on which date Respondent The Chesapeake and Ohio Railway Company ("C&O") assumed all B&O assets, obligations, liabilities, rights and privileges.* For purposes of

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* The C&O is a wholly owned subsidiary of CSX Corporation ("CSX"). Subsidiaries and affiliates of CSX and the C&O, other than those wholly owned by them, are as follows:

(continued)

clarity, this Opposition to Petition

For a Writ of Certiorari continues to

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* (continued)

1. CSX Resources, Inc., a wholly owned subsidiary of CSX, has a partial interest in Mid-Allegheny Corporation.

2. The C&O has a partial interest in the following:

a. Allegheny and Western Railway Company;
b. The Baltimore and Philadelphia Railroad Company;
c. Clearfield and Mahoning Railway Company;
d. Dayton and Michigan Railroad Company;
e. Dayton and Union Railroad Company;
f. The Home Avenue Railroad Company;
g. The Cleveland Terminal & Valley Railroad Company.

3. Western Maryland Railway Company, a wholly owned subsidiary of the C&O, has a partial interest in the Baltimore and Cumberland Valley Railroad Extension Company.

4. CSX Transportation, Inc., a wholly owned subsidiary of CSX, has a partial interest in the following:

(continued)

refer to the B&O in connection with matters preceeding its dissolution.

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* (continued)

a. Augusta and Summerville Railroad Company;
b. Beaver Street Tower Company;
c. Central Transfer Railway and Storage Company;
d. Chatham Terminal Company;
e. North Charleston Terminal Company;
f. Paducah & Illinois Railroad Company;
g. Winston-Salem Southbound Railway Company;
h. Woodstock & Blockton Railway Company.

5. Various subsidiaries of CSX have a partial interest in Richmond Washington Company, which in turn has a partial interest in Richmond, Fredericksburg and Potomac Railroad Company.

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LOWER COURT OPINIONS

The Bench Opinion of Judge John R. Hargrove of the United States District Court for the District of Maryland has been transcribed and appears in the Appendix (App. 27a). The Opinion of Circuit Judges Phillips and Ervin and Senior District Judge Merhige for the Eastern District of Virginia, sitting by designation is published, Mosco v. Baltimore & Ohio R. R., 817 F.2d 1088 (4th Cir. 1987) and appears in the Appendix (App. 1a)

STATUTORY PROVISIONS

This case involves the partial grant and affirmance of a directed verdict in favor of Respondent, The Baltimore and Ohio Railroad Company ("B&O") whereby the lower courts held as a matter of law that the B&O was not liable to Petitioner Mosco under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 by reason of an alleged violation of the Federal Boiler Inspection Act, 45 U.S.C. §23 and more specifically regulations promulgated thereunder by the Federal Railroad Administration ("FRA") pertaining to ventilation and undistorted window panes. 49 C.F.R. §229.119(b) and (d).

§51 THE FEDERAL EMPLOYERS' LIABILITY ACT

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or

between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as

entitled to the benefits of this chapter.

45 U.S.C. §51.

§23 THE BOILER INSPECTION ACT

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

45 U.S.C. §23.

REGULATIONS OF THE FEDERAL RAILROAD ADMINISTRATION

The provisions of the FRA's Safety Glazing Standards, 49 C.F.R. Part 223, are set forth in pertinent part in the Appendix (App. 53a).

FRA Regulation Re:
Undistorted Window Panes

> Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab. (See also, Safety Glazing Standards, 49 CFR Part 223, 44 FR 77348, Dec. 31, 1979.)

49 C.F.R. §229.119(b).

FRA Regulation Re: Ventilation

> The cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 50 degrees Fahrenheit 6 inches above the center of each seat in the cab.

49 C.F.R. §229.119(d).

No. 86-2037

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

LEE A. MOSCO, JR.,

Petitioner,

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
FOURTH CIRCUIT

STATEMENT OF THE CASE

Petitioner, Lee A. Mosco, Jr., a locomotive engineer of Respondent, The Baltimore and Ohio Railroad Company, filed suit in the United States

District Court for the District of Maryland against his railroad employer for an injury he allegedly sustained on August 3, 1983. While Mosco was operating a locomotive with the side window opened in the vicinity of the Virginia Avenue Tunnel in Washington, D. C. he was struck on the head by an unidentified object which Mosco speculated to have been a stone thrown by a juvenile. The only evidence as to how the accident occurred was Mosco's own, equivocal testimony that he thought he saw a blur originating from the embankment near the tunnel and overhead bridge. No one, including Mosco, had seen a juvenile in the vicinity at the time of the occurrence, however. Mosco sustained a mild concussion from which he fully

recovered but he did not return to his usual duties as an engineer. According to Mosco, he was permanently disabled by alleged double vision which his own physician could not detect.

Mosco sought to hold the B&O liable for the alleged consequences of his injury based upon three theories.

Mosco's first theory, which he most strenuously urged before the lower courts, was premised upon an erroneous interpretation of the general provisions of Section 23 of the Boiler Inspection Act as imposing a standard of strict liability. Mosco argued that the occurrence could have been prevented if the B&O had installed bars, grates, screens or similar devices over the locomotive's window, and, therefore, the B&O was required to

install the same to comply with the Boiler Inspection Act. The Boiler Inspection Act does not make a carrier an insurer, however. Cf. Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 138, 140, 80 S.Ct. 242,243 (1959). Its provisions require railroads to keep their locomotives and their parts and appurtenances in proper condition and safe to operate for their intended purpose without unnecessary peril to life and limb -- not to install every conceivable piece of equipment which could prevent an injury no matter how unconnected with the operation of the locomotive. Southern Railway Co. v. Lunsford, 297 U.S. 398, 56 S.Ct. 504 (1936).

Moreover, Mosco did not dispute that the B&O had complied with the

regulations promulgated by the Federal Railroad Adminstration, setting the standard of compliance with Section 23 as to window protection. See 49 C.F.R. Part 223, requiring windows to be glazed with a bullet-proof material. And Mosco was not prepared to offer any evidence that the window as it existed at the time of the occurrence was unsafe to operate under the general standard of Section 23. Instead, Mosco intended to have the jury, in effect, promulgate regulations requiring bars, screens, grates or similar devices based solely upon proposed lay, opinion testimony of Mosco's fellow trainmen that if such devices had been installed the occurrence would not have happened.

Mosco's second theory of liability for which he seeks review by the Court

was a tangential argument given little focus by Mosco during the course of trial and on appeal. According to this theory the accident was caused because the window on the right side of the locomotive was allegedly dirty and the interior cab of the locomotive was allegedly hot, purportedly in violation of the FRA's regulations that locomotives be equipped with undistorted window panes and provide adequate ventilation. See 49 C.F.R. §229.119(b) and (d). Mosco, however, failed to produce sufficient evidence that the B&O violated the regulations. If the windows were dirty it was solely Mosco's fault -- not the B&O's. Mosco unequivocally testified that he alone was responsible for cleaning all of the locomotive's windows but he had

neglected to do so. And Mosco's allegations about the ventilation system was based merely upon his testimony that it was a hot summer day and, therefore, the temperature inside the locomotive's cab compartment was high. No evidence at all was produced regarding the ventilation system, itself.

Likewise, Mosco was unable to show a sufficient causal connection between the alleged dirty window and the summer heat and the criminal act of the alleged stone thrower. Instead Mosco urged an attenuated theory premised upon his testimony that if the side window had not been dirty and if it had not been a typical August day and, therefore, hot inside the locomotive, he would not have opened the window.

The argument continued, that since the window was opened, the B&O was required to install bars grates or similar devices because if the B&O had done so, the occurrence would not have happened. This scenario was too attenuated and remote to establish a causal connection between the alleged violations of the FRA regulations and the criminal act of the alleged stone-thrower.

Mosco's third theory was premised upon the general provisions of Section 51 of the FELA, requiring carriers to exercise ordinary care to provide a reasonably safe workplace.

The case proceeded to trial from February 24 through 26, 1986 before District Judge Hargrove and a jury. At the close of Mosco's case on February

25, 1986, the trial court granted a directed verdict, in favor of the B&O in regard to both of Mosco's theories under the Boiler Inspection Act. Trial continued on Mosco's claim against the Railroad under the FELA, and the jury eventually returned a verdict in favor of Respondent B&O under this theory of liability as well.

Mosco thereafter filed a timely Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. On April 21, 1987, in an opinion by Judge Ervin, joined in by Judge Phillips and Judge Merhige, sitting by designation (hereinafter "the Panel"), the Panel affirmed the decision of the district court granting a directed verdict in favor of the B&O under the Boiler Inspection Act and

upheld the jury verdict in favor of the B&O under Section 51 of the FELA.

The Panel rejected Mosco's first theory of liability, that the B&O was required to install devices on the locomotive's window, solely on the basis of statutory construction. The Panel held that "...a carrier cannot be held liable under the Boiler Inspection Act for failure to install equipment on its locomotive unless the omitted equipment (1) is required by applicable federal regulations; or (2) constitutes an integral or essential part of a complete locomotive" and that bars, grates, screens and similar devices do not come within the rule. 817 F.2d 1088, 1091. (App. 12a.) Mosco does not dispute the accuracy of the Panel's statutory interpretation.

In regard to Mosco's second theory the Panel held that Mosco failed to produce sufficient evidence to establish a violation of the FRA regulations. The district court directed the verdict on the same basis and further held that Mosco failed to show the requisite causal nexus between the alleged violation and the occurrence.

Thereafter on July 20, 1987, Mosco filed a timely Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

I. Summary

Petitioner Mosco seeks review by this Court, contending that a grant of a directed verdict in general and in FELA and Boiler Inspection Act cases in

particular violates a plaintiff's constitutional right to a jury trial. Mosco further alleges that the lower courts erred in holding that his testimony regarding the alleged heat and dirt was insufficient, as a matter of law, to show a violation of the FRA regulations and to establish a causal connection with the alleged criminal act of an unidentified party. In this same vein, Mosco also contends that the Court erred in determining factual issues, albeit in his favor, instead of presenting these issues to the jury.

The B&O submits that Mosco's Petition for Writ of Certiorari is not properly before the Court. None of the "special and important reasons" for review required by Supreme Court Rule 17.1 here exist.

Significantly, Mosco failed to specifically set forth the reasons relied on for the allowance of the writ as required by Supreme Court Rule 21.1(j). Instead, Petitioner generally espouses the importance of constitutional rights and the policy underpinnings of the FELA, without regard to the issues actually decided in this case. The B&O respectfully submits that Petitioner's general statements do not suffice to warrant a grant of review by this Court.

II. The Grant Of A Directed Verdict In Cases Involving The FELA And Boiler Inspection Act Does Not Violate The Seventh Amendment To The United States Constitution.

Mosco's argument that the grant of a directed verdict violates a plaintiff's constitutional right to a jury trial does not present a proper

question for review under Supreme Court Rule 17.1. As expressed by this Court in Galloway v. United States, 319 U.S. 372, 389, 63 S.Ct. 1077, 1086 (1943), Mosco's objection is nearly a century too late.

Equally unavailing is Mosco's contention that when Congress enacted the FELA, it somehow changed the Seventh Amendment. While it is true that Congress altered the standard of liability by allowing an FELA plaintiff to recover when the carrier's negligence was a cause in part of the occurrence; Congress in no manner altered the plaintiff's burden of proof or circumscribed the trial judge's power and duty to grant a directed verdict. As in all cases, the trial judge must determine whether to grant a

directed verdict in light of the standard of liability; but the judge must nonetheless perform his duty to direct the verdict when warranted, of course. Therefore, when this Court was presented with the identical issue in Baltimore & O. R. Co. v. Groeger, 266 U.S. 521, 45 S.Ct. 169 (1925), it held that the function of the court and jury is no different in FELA and Boiler Inspection Act cases than any other civil case.

> The credibility of witnesses, the weight and probative value of evidence are to be determined by the jury and not by the judge. However, many decisions of this court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.

266 U.S. at 524, 45 S.Ct. at 170-171 (emphasis supplied) (citations omitted). And this Court has not hesitated to hold that a lower court erred when it failed to direct a verdict in a number of actions brought under the FELA, Chicago Great Western R. Co. v. Rambo, 298 U.S. 99, 56 S.Ct. 693 (1936); New York Cent. R. Co. v. Ambrose, 280 U.S. 486, 50 S.Ct. 198 (1930); Atchison, T. & S.F. Ry. Co. v. Toops, 281 U.S. 351, 50 S.Ct. 281 (1930); and Toledo, St. L. & W.R. Co. v. Allen, 276 U.S. 165, 48 S.Ct. 215 (1928) or affirm the grant of a directed verdict, Inman, supra; Brady v. Southern Ry. Co., 320 U.S. 476, 64 S.Ct. 232 (1943); and Aerkfetz v. Humphreys, 145 U.S. 418, 12 S.Ct. 835 (1892).

III. The Grant Of A Directed Verdict In Favor Of The B&O Was Correctly Entered And Affirmed Where Petitioner Mosco Failed To Produce Sufficient Probative Evidence That The B&O Violated FRA Regulations And That The Alleged Violations Caused the Occurrence.

Petitioner Mosco's allegation of liability regarding the FRA regulations was premised upon Section 51 of the FELA which confers a cause of action upon a railroad employee whose injury was caused in part by the negligence of the employer or a violation of the Boiler Inspection Act including regulations promulgated by the FRA pursuant thereto. It is well-settled, and Mosco does not dispute, that to impose liability under the Boiler Inspection Act he was required to show both that the B&O violated the FRA regulations and that the alleged

violations were a cause in part of the occurrence.

Petitioner Mosco, however, contends that under the holdings of Myers v. Reading Co., 331 U.S. 477, 67 S.Ct. 1334 (1947); Ellis v. Union Pac. R. Co., 329 U.S. 649, 67 S.Ct. 598 (1947); and Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 (1946) that a jury question was presented as long as he produced any evidence.

The B&O submits that this Court has never held that the mere production of evidence, without more, is sufficient to raise a jury question. A proper reading of the above cited cases is that in regard to causation the evidence must be of sufficient probative value, capable of raising a reasonable inference of causation. See

also Toops supra; and Ambrose, supra. When the evidence produced is only suggestive of a remote causal connection, this Court has consistently held that the verdict must be directed. Davis v. Wolfe, 263 U.S. 239, 243, 44 S.Ct. 64, 66 (1923); and Brady, supra, 320 U.S. at 483-484, 64 S.Ct. at 236-237.

Moreover, the above rule set forth in the cases cited by Mosco is derived from the "cause in part" language of the FELA and does not apply to proof of a violation of the Boiler Inspection Act. In the latter case, this Court has firmly held that plaintiff must produce "substantial" probative evidence that the Act has been violated. Rambo, supra, 298 U.S. at 105, 56 S.Ct. at 695.

The FRA regulations upon which Mosco relied to show negligence per se provide:

> Cabs, floors, and passageways.
>
> * * *
>
> (b) Cab windows of the lead locomotive shall provide an undistorted view of the right-of-way for the crew from their normal position in the cab, (See also, Safety Glazing Standards, 49 CFR Part 223, 44 FR 77348, Dec. 31, 1979.)
>
> * * *
>
> (d) The cab shall be provided with proper ventilation and with a heating arrangement that maintains a temperature of at least 50 degrees Fahrenheit 6 inches above the center of each seat in the cab.

49 C.F.R. §229.119 (b) and (d).

Under the standard set forth in Rambo, supra, Mosco was required to produce substantial evidence that the B&O violated the FRA regulations. Mosco not only failed to sustain his

burden, in one instance, he actually negated any inference that the B&O was to blame.

In regard to paragraph (b), Mosco merely testified that the side window was dirty and therefore, he did not have adequate visilibity of the tracks. Mosco did not testify that the window provided a distorted view as the term is used in pargraph (b). See Black's Law Dictionary, 425 (rev. 5th ed. 1979) ("Distort. To twist out of natural or regular shape; to twist aside physically; to force or put out of true posture; to wrest, or deform."); and Webster's New Twentieth Century Dictionary Unabridged, 534 (2nd ed. 1964) ("Distort, ... 1. to twist out of natural or regular shape; to

change the usual shape or appearance of; as, to distort the features.")[1]

Likewise, in regard to paragraph (d) Mosco merely testified that it was a hot summer day and, therefore, the temperature was high inside the locomotive's cab compartment. Mosco did not produce any evidence at all regarding the ventilation system, itself, -- the operative term in

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1. See the following cases holding that the courts should generally assume that Congress intended to express its purpose through the ordinary meaning of the words it uses: Escondido Mut. Water v. La Jolla, 466 U.S. 765, 772, 104 S.Ct. 2105, 2110 (1984); Jefferson Cty. Pharmaceutical Ass'n v. Abbott Labs., 460 U.S. 150, 157-171, 103 S.Ct. 1011, 1017-1024 (1983); Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980); Atchison, T. & S. F. Ry. Co. v. United States, 617 F.2d 485, 490-491 (7th Cir. 1980); and National Insulation Transp. Committee v. I.C.C., 683 F.2d 533, 537-540 (D.C. Cir. 1982).

paragraph (d). See Webster's New Twentieth Century Dictionary Unabridged, 2028 (2nd ed. 1964) ("Ventilate, ... 1. to circulate fresh air in (a room, etc.), driving out foul air. 2. to circulate in (a room, etc.) so as to freshen: said of air. 3. to provide with an opening for the escape of air, gas, etc.; to furnish a means for airing ...." "Ventilation, 1. the act or process of ventilating. 2. means of doing this; ventilating equipment....")

Although the FRA provisions clearly do not pertain in the instant case, the lower courts gave Mosco every benefit of the doubt by assuming that the regulations were applicable and accepting as true Mosco's testimony that the window indeed was dirty and

the temperature inside the locomotive's cab was hot. Even so, the evidence was insufficient. In affirming the grant of a directed verdict the Fourth Circuit Panel correctly held:

> We find Mosco's arguments unpersuasive. There is no suggestion that the cab windows would have provided inadequate visibility if they had been clean. Mosco testified that on the day he was injured, he inspected the locomotive before beginning work but he did not clean the windows. He further indicated that on some occasions, he did clean the windows if they were extremely dirty. Thus, it appeared from Mosco's own testimony that any impaired visibility resulting from dirt on the windows was due to his own failure to clean the windows, and not to any failure of the B&O to maintain the parts and appurtenances of the locomotive in safe and proper condition as required by the Boiler Inspection Act.

817 F.2d at 1092. (App. 16a-17a.) See also Ehalt v. McCarthy, 138 P.2d 639, 645-646 (Utah 1943) (where the

locomotive's boiler was in proper condition and safe to operate, but plaintiff neglected to keep it filled with water, the railroad did not violate the Boiler Inspection Act); Pryor v. Chicago, R.I. & P.Ry. Co., 39 P.2d 563, 570 (Okl. 1935); Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 53 (Mo. 1933)("[A] plaintiff cannot recover when his evidence not only shows no defect but also fails to show that the unsafe operation of the appliance was not the result of his own improper act, when the circumstances tend to show that such unsafe operation of the appliance would be a natural and usual result of his improper operation."); Luce v. New York, C & St. L.R. Co., 205 N.Y.S. 273, 277, 209 App. Div. 728 (1924) (where defendant

provided the plaintiff with a safe locomotive, but plaintiff failed to oil it, the defendant did not violate the Boiler Inspection Act); cf. Brady, supra, 320 U.S. at 484, 64 S.Ct. at 236 ("Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm.")

The Fourth Circuit likewise rejected Petitioner's contention regarding ventilation, but as a matter of statutory construction. The Panel held that this argument ". . . is merely a restatement of his claim that the cab windows should have been

equipped with protective devices." 817 F.2d at 1092. (App. 16a-17a.) Significantly Mosco does not seek review of the Panel's interpretation of the statute and therefore his contention regarding adequate ventilation must also fail.

The District Court rejected Mosco's Boiler Inspection Act claim on the same basis and also set forth another reason why the claim was fatally flawed. Common sense compels the conclusion that the occurrence was caused by the alleged misconduct of a third party -- not by dirt and heat. Simply stated the remote causal connection woven by Mosco was too attenuated to impose liability upon the B&O for another person's misdeeds. Davis v. Wolfe, supra, 263 U.S. at 243, 44 S.Ct. at 66

("[A]n employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury ....") See also Green v. River Terminal Ry. Co., 763 F.2d 805, 810 (1985); Johnson v. Chicago Great Western Ry. Co., 64 N.W.2d 372, 376-378 (Minn. 1954); and Pryor, supra, 39 P.2d at 571-572; cf. St. Louis & S. F. R. Co. v. Conarty, 238 U.S. 243, 249, 35 S.Ct. 785, 786; and Lang v. New York Cent. R. Co., 255 U.S. 455, 461, 41 S.Ct. 381, 384.

CONCLUSION

For the foregoing reasons, Respondent, The Baltimore and Ohio Railroad Company respectfully requests that this Honorable Court deny Petitioner's Request for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Civil Action No.
86-2037

LEE A. MOSCO, JR.,

Plaintiff-Appellant,

v.

THE BALTIMORE & OHIO
RAILROAD COMPANY,

Defendant-Appellee.

Before Phillips and Ervin, Circuit Judges, and Merhige, Senior District Judge for the Eastern District of Virginia, sitting by designation.

Ervin, Circuit Judge:

Plaintiff Lee A. Mosco, Jr., appeals from a judgment entered in favor of

defendant Baltimore & Ohio Railroad ("B&O") in this case involving claims under the Federal Boiler Inspection Act, 45 U.S.C. §23 (1982), and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§51 et seq. (1982). Although we do not entirely agree with the reasoning of the district court, we affirm the judgment for the B&O for the reasons stated below.

Mosco was employed by the B&O as a locomotive engineer. He was injured when a rock, or some similar object, came through the open window of the locomotive he was operating and struck him in the head. Although the windows of the locomotive were made of shatter-proof material, they were not equipped with any protective screens, bars, grates or similar devices.

At the time the injury occurred, Mosco was approaching the Virginia Avenue Tunnel in Washington, D. C. He testified that he had been stoned by juveniles in this area on a number of occasions, and that he had reported these stoning incidents to the B&O. He further stated that on the day of the accident, he was operating the locomotive with its right window two to three inches open, in order to cool and ventilate the cab of the locomotive. As he approached the Virginia Avenue Tunnel, Mosco opened the window further to a width of about eight inches. He testified that it was necessary for him to open the window to check his ground speed, because the window was so dirty that he could not otherwise see out.

Before trial began, the B&O made a motion in limine to preclude Mosco from

offering any evidence concerning the absence of screens, bars, grates or similar devices from the windows of the locomotive's cab, and to prevent Mosco from contending that the absence of such protective devices constituted a violation of the Boiler Inspection Act. The district court granted this motion and, at the close of Mosco's case, directed a verdict for the B&O on the Boiler Inspection Act claim. Mosco's FELA claim went to the jury, and the jury returned a verdict for the B&O.

Although Mosco makes numerous assignments of error, his primary contention is that the district court erred in granting the B&O's motion in limine and in later directing a verdict for the B&O on the Boiler Inspection Act claim. In our view, the district

court acted properly in granting the B&O's motions in limine and for directed verdict, although we reach this conclusion for different reasons than those relied upon by the district court.

The Boiler Inspection Act prohibits common carriers by railroad from operating any locomotive unless the "locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. . . ." 45 U.S.C. §23. The Act also prohibits the operation of any locomotive that has not passed certain tests and inspections prescribed in the applicable rules and regulations. Id.

The Federal Railroad Administration has promulgated regulations concerning locomotive safety standards and inspections. See 49 C.F.R. §§ 200 et seq. (1986).

The Boiler Inspection Act imposes upon carriers by railroad an absolute duty to maintain their locomotives in safe and proper condition. Lilly v. Grand Trunk Western Railroad Co., 317 U.S. 481, 485 (1943). Carriers that violate the Act may be held liable to employees who are injured as a result of the violation. See, e.g., Lilly, 317 U.S. at 485; Green v. River Terminal Railway Co., 763 F.2d 805, 810 (6th Cir. 1985).

In this case, the essence of Mosco's Boiler Inspection Act claim was that the locomotive in which he was injured was

not safe to operate without screens, bars, grates or similar protective devices over the windows of the locomotive's cab. Mosco claimed that such protective devices were necessary to make the locomotive safe, because it was often necessary to operate the locomotive with its windows open.

We believe that the district court incorrectly apprehended the nature of the duty imposed by the Boiler Inspection Act in granting the B&O's motion in limine. The district court was of the opinion that a carrier cannot violate the Act so long as it complies with the applicable safety and inspection regulations promulgated by the Federal Railroad Administration. As the district court correctly noted, the B&O had complied with the regulation

requiring safety glazing of locomotive cab windows. See 49 C.F.R. §223. The district court believed that the B&O's compliance with this regulation satisfied its duty under the Boiler Inspection Act. Accordingly, the district court excluded the evidence concerning the absence of screens, bars, grates or similar protective devices from the cab windows that Mosco intended to offer to prove a violation of the Boiler Inspection Act.

We disagree with the district court's rationale for granting the B&O's motion in limine. As other courts have observed, a carrier may violate the Boiler Inspection Act in one of two ways. First, it may fail to comply with the regulations promulgated by the Federal Railroad Administration.

Compliance with these regulations is not, however, the only duty imposed by the Act. The Act also imposes a broader duty on carriers to keep all the parts and appurtenances of their locomotives in proper condition and safe to operate without unnecessary peril to life or limb. Thus, even if a carrier complies with the regulations, it may still violate the Act if the parts or appurtenances of its locomotives are otherwise unsafe. Contrary to the district court's view, "[t]he argument that there can be no violation of the Act absent a violation of some regulation or order of the. . . Federal Railroad Administration is without merit." Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1246 (8th Cir.), cert denied, 106 S.Ct. 208 (1985).

Accord Whelan v. Penn Central Co., 503 F.2d 886, 890 (2d Cir. 1974); St. Louis Southwestern Railway Co. v. Williams, 397 F.2d 147, 149-51 (5th Cir. 1968); Calabritto v. New York, New Haven & Hartford Railroad Co., 287 F.2d 394, 396 (2d Cir.), cert denied, 366 U.S. 928 (1961).

This is not to say, however, that liability under the Boiler Inspection Act may be imposed in every case in which it is alleged that a carrier's failure to install some device on a locomotive rendered the locomotive unsafe. The Act imposes on carriers only the duty to maintain the parts and appurtenances of their locomotives in safe and proper condition, and the term "parts and appurtenances" does not include every item of equipment that

conceivably could be installed on a locomotive. Rather, as the Supreme Court has stated:

> Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission [now the Federal Railroad Administration], are within the [Boiler Inspection Act]. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not. These have not been excluded from the usual rules relative to liability.

Southern Railway Co. v. Lunsford, 297 U.S. 398, 402 (1936); see also Marshall v. Burlington Northern, Inc., 720 F.2d 1149, 1152 (9th Cir. 1983) (Lunsford interpreted "parts and appurtenances" "as encompassing '[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by

lawful order of the [Secretary] . . .'") (emphasis deleted).

From Lunsford, we derive the rule that a carrier cannot be held liable under the Boiler Inspection Act for failure to install equipment on a locomotive unless the omitted equipment (1) is required by applicable federal regulations; or (2) constitutes an integral or essential part of a completed locomotive. In this case, the bars, screens, grates or similar protective devices, which Mosco claims should have been installed over the windows of the locomotive's cab, are not required by applicable federal regulations. Thus, under the rule we have stated, Mosco would have a viable claim under the Boiler Inspection Act only if the omitted protective devices

constitute an integral or essential part of a completed locomotive. In our opinion, they do not. Cf. Lunsford, 297 U.S. at 399-402 (experimental safety braking device was not integral or essential part of a completed locomotive).

Because the B&O's failure to install protective devices over the windows of the locomotive in which Mosco was injured did not amount to a failure to maintain the parts and appurtenances of the locomotive in safe and proper condition under the Boiler Inspection Act, we believe that the district court correctly excluded evidence concerning the absence of such protective devices as irrelevant. Mosco contends, however, that even if the exclusion of this evidence was proper, the district court

nonetheless erred in directing a verdict for the B&O on the Boiler Inspection Act claim. We disagree.

Mosco testified that on the day his injury occurred, the windows of the locomotive's cab were so dirty that he had to open them to see out. He also testified that unless the windows were kept open, the interior of the cab became unbearably hot and inadequately ventilated. Mosco contends that this evidence was sufficient to withstand the B&O's motion for directed verdict, because the dirtiness of the windows and the inadequate ventilation violated federal regulations promulgated under the Boiler Inspection Act. The pertinent regulations provide that "[c]ab windows of the lead locomotive shall provide an undistorted view of

the right-of-way for the crew from their normal position in the cab" and "[t]he cab shall be provided with proper ventilation. . . ." 49 C.F.R. § 229.119 (b) and (d).

We find Mosco's arguments unpersuasive. There is no suggestion that the cab windows would have provided inadequate visibility if they had been clean. Mosco testified that on the day he was injured, he inspected the locomotive before beginning work but did not clean the windows. He further indicated that on some occasions, he did clean the windows if they were extremely dirty. Thus, it appeared from Mosco's own testimony that any impaired visibility resulting from dirt on the windows was due to his own failure to clean the windows, and not to any

failure of the B&O to maintain the parts and appurtenances of the locomotive in safe and proper condition as required by the Boiler Inspection Act.

Mosco's argument concerning inadequate ventilation of the locomotive's cab is similarly without merit. Mosco's testimony indicated that ventilation in the cab was adequate if the windows were left open. There was, however, as he points out, no way to prevent objects from entering the open windows of the cab. We fail to see how this state of affairs violates the requirement that carriers provide their locomotive cabs with adequate ventilation. In our view, Mosco's argument on this point is merely a restatement of his claim that the cab windows should have been equipped with

protective devices. For the reasons discussed above, this claim does not constitute a viable cause of action under the Boiler Inspection Act.

Because the district court properly excluded evidence concerning the absence of bars, grates, screens or similar protective devices from the windows of the locomotive's cab, the B&O was entitled to a directed verdict on Mosco's Boiler Inspection Act claim. The evidence of dirty windows and purportedly inadequate ventilation, which was admitted, was not substantial enough to support a verdict in favor of Mosco on the Boiler Inspection Act claim. Because reasonable jurors could not have returned a verdict for Mosco, the district court properly directed a verdict for the B&O on this claim. See,

e.g., Gairola v. Commonwealth of Virginia Department of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985) (test for directed verdict is whether there can be only one conclusion as to verdict that reasonable jurors could reach; unless there is substantial evidence upon which jury could properly return verdict for nonmoving party, motion for directed verdict must be granted).

Although Mosco had no viable Boiler Inspection Act claim based on the absence of protective devices from the windows of the locomotive's cab, it is possible that he might have stated a meritorious FELA claim based on the same facts. As the Supreme Court has indicated, devices or equipment that do not fall within the coverage of the

Boiler Inspection Act are not therefore excluded from the usual rules of liability. Lunsford, 297 U.S. at 402. If the jury had found that the B&O was negligent in failing to install protective devices over the cab windows, it could have returned a verdict for Mosco based on breach of the B&O's duty of reasonable care under the FELA.

Mosco, however, never offered any evidence concerning the absence of protective devices from the cab windows to prove breach of the B&O's duty of care under the FELA. In response to our questioning at oral argument, Mosco's counsel stated that he believed that the district court's ruling on the motion in limine had precluded him from introducing this evidence for any

reason, including proving negligence of the B&O under the FELA. We note, however, that the B&O's motion in limine was directed only to the exclusion of evidence concerning the absence of protective devices for purposes of Mosco's Boiler Inspection Act claim. Mosco never asked the district court whether its ruling on the motion in limine extended to his FELA claim as well, and he never made a proffer concerning the absence of protective devices to prove a FELA violation. It was not until oral argument before this court that Mosco first made the claim that the district court had improperly excluded evidence concerning the absence of protective devices from the cab windows for purposes of his FELA claim.

Under these circumstances, we find no reversible error in the district

court's grant of the motion in limine. It appears to us that Mosco simply failed to ascertain the scope of the district court's ruling and thereafter failed to offer evidence that might have enabled him to prevail on a negligence theory under the FELA. Mosco's failure to bring the error he now asserts to the attention of the trial court precludes us from granting him relief on this ground, since any error that was committed below was not plain error.

Mosco's remaining assignments of error require little discussion. Mosco's primary claim under the FELA was that the B&O had breached its duty to provide him a safe place to work by failing to take precautions against the activities of the rock-throwing

juveniles who, according to Mosco, congregated at the Virginia Avenue Tunnel. The district court correctly instructed the jury that the B&O had a nondelegable duty under the FELA to provide Mosco a safe place to work, even when Mosco's duties required him to go onto property owned by a third person, such as the property surrounding the Virginia Avenue Tunnel. See Cazad v. Chesapeake & Ohio Railway Co., 622 F.2d 72, 75 (4th Cir. 1980). The district court further instructed the jury that a carrier may be held liable under the FELA if a dangerous condition on a third person's property causes injury to an employee of the carrier, so long as the dangerous condition was foreseeable to the carrier.

In our opinion, these instructions adequately informed the jury of the

duty imposed on the B&O by the FELA. Mosco, however, contends that the district court erred in failing to instruct the jury that the B&O had a duty to inspect the premises surrounding the Virginia Avenue Tunnel for the purpose of discovering the juveniles who, according to Mosco, customarily stoned passing trains. In cases in which property defects on premises owned by a third person have caused injury to a railroad employee, we have held that the railroad has a duty to inspect the premises and protect its employees from possible danger. See, e.g., Cazad, 622 F.2d at 75. However, Mosco has cited no authority, and we have found none, holding that the FELA imposes a duty on railroad employers to inspect premises owned by a third person for the purpose

of detecting the intentional criminal activity of trespassers that may occur there. We are unwilling to hold that the B&O had such a duty in this case, and, accordingly, we conclude that the district court did not err in declining to give the jury an instruction to that effect.

Mosco's final argument is that the district court committed prejudicial error in questioning him on two occasions during the trial. On the first occasion, the district court questioned Mosco about a statement he had given to a claims agent for the B&O after his injury. This interrogation, which elicited nothing more than the same answers that Mosco had previously given on cross-examination, was not prejudicial to Mosco.

On the second occasion, the district court questioned Mosco about the renewal of his driver's license as it related to his claim of impaired vision resulting from the head injury he had suffered. Mosco previously had testified that his driver's license had not become due for renewal for a period of two and one-half years, although, as the district court noted, applicable state law requires renewal of driver's licenses every two years. Because Mosco's testimony on this point was confusing and likely erroneous, the district court acted properly in questioning him to obtain clarification. See e.g United States v. Parodi, 703 F.2d 768, 775 (4th Cir. 1983) (district court has duty to see that facts are properly developed at trial).

For the reasons stated in this opinion, the judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF MARYLAND

Civil Action No.
HAR-84-4228

LEE A. MOSCO, Jr.,

Plaintiff,

v.

THE BALTIMORE AND OHIO
RAILROAD COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS
Volume II

BEFORE THE HON. JOHN R.
HARGROVE, J.U.D.C.

APPEARANCES

For the Plaintiff: LAWRENCE A. KATZ, ESQ.
For the Defendant: RANSOM J. DAVIS, ESQ.

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[131] MR. DAVIS: Your Honor, the defendant does [have] a written motion

for a directed verdict in this case at the close of plaintiff's evidence, under Rule 50A, of the Federal Rules of Civil Procedure.

I have not prepared a separate legal memorandum in support of the motion. The grounds of the motion in general terms are stated there. Of course, I would rely on the legal argument on the trial memorandum that we submitted at the outset of the case. [132] We have two statutory bases of suit in this particular action as the Court knows from the motion in limine argued at the beginning of the case.

Under the Boiler Inspection Act and given the state of the plaintiff's proof here and frankly, the Court's prior ruling, it seems to me the defendant is entitled to a directed verdict under that theory of the case.

The plaintiff has virtually no evidence before the Court and before this jury showing any violation of the Boiler Inspection Act, showing any unsafe condition of the locomotive. And of course to the extent his proffer was that something about the window was deficient, the design of the window really in terms of screens, bars, grading, that type of thing, -- he hasn't offered any proof, consistent with the Court's rule, --

THE COURT: The Court ruled that the evidence was not proper under the Boiler Inspection Act. The grates and seals, -- screens, bars and seals and other than the window itself. I mean, that is the appurtenance that the [A]ct talks about, the window. It doesn't talk about things that are not on the

vehicle. I mean on the locomotive. It talks about what is on there, whether or not, -- I think the [A]ct itself says [133] parts and appurentences. It doesn't say what might and what might not. I think we have been into that. There is no sense in going, --

MR. DAVIS: Exactly, there is no point, --

THE COURT: I note that you do talk about the absence of screens, -- but I restricted him from getting involved in that, simply because that was not relevant in this case, under the safety act.

MR. DAVIS: Well, the motion itself was prepared prior to the beginning of trial.

THE COURT: That is probably, -- okay, all right.

MR. DAVIS: Exactly, -- I might say also that plaintiff was not prepared for example, even to offer any expert testimony on their, which even without the Court's ruling would have been a deficiency in proof.

THE COURT: It would have been very tough to do that without expert witnesses.

MR. DAVIS: The Federal Boiler Liability Act is the next grounds of suit. Now, I would submit that at this stage in the case, we are entitled to a directed verdict on that theory as well.

We are arguing here as we said in the beginning of the case, with the intentional act of a third person. This is accepting the plaintiff's theory [134] in the case that this incident is attributable to the actions

of some malicious stone thrower, a kid or otherwise.

There isn't sufficient evidence I submit to Your Honor on the issue of forseeability even given the favorable inferences that must be drawn to the plaintiff's proof at this point to support a finding in the plaintiff's favor. There is not sufficient testimony from any of the individuals who appeared, Mr. Epperly, Mr. Adkins or Mr. Mosco, as to sufficient number of incidents, --

THE COURT: Well, Mr. Epperly and Mr. Adkins didn't, -- didn't have any of the actual -- they were not there, but they talked about previous incidents.

MR. DAVIS: They talked about other occasions. They certainly weren't part

of the train crew on that particular day. Mr. Adkins' memory was so bad that he said he may have been on that particular run once or twice before August 1983, but his testimony was so blurred in terms of placing the time, as to whether it was before or after August, '83, that I submit it is not entitled to any credit.

But even Mr. Epperly's testimony however, before the Court and Mr. Mosco's, there isn't sufficient evidence there to identify this as a trouble [135] spot, that the railroad should have done more than it already had done, which was to equip that locomotive with shatterproof windows and to have police available to respond to calls.

I submit that given the plaintiff's proofs, he hasn't made this out to be a

trouble spot such as would call for more measures than were already done in this particular instance.

And I would go one step further. I think the Court at the bench conference, and of course, as we developed in testimony through Mr. Mosco, the proof here really doesn't even go that far. We don't have any identified stone thrower. There is no proof known that even supports the inference that this rock or projectile or whatever it was, may have originated with a bridge or some other place. We can't even identify it with a third person.

On that basis, I can't imagine how frankly the railroad could have responded in any fashion. Police protection can't address falling matter from the tunnel area or something of

that nature. On this basis, and as well of course, the acknowledged fact which plaintiff now stiplates, that this is Conrail's property, not the B&O's property, we just do not have even a threshhold showing of negligence which would [136] compel the B&O to go forward in any way, and respond to plaintiff's evidence.

MR. KATZ: Your Honor, we obviously have not had an opportunity to specifically respond to any of this motion either, and we too, --

THE COURT: Well, it is very rare that you get that opportunity at the end of your case. You usually go right on to the next part.

MR. KATZ: Your Honor, I will attempt to lay out our general memorandum of law on this item. We note

the series of cases on page 7 of our memorandum that point out as in most law, that in granting a nonsuit, Your Honor has to give us every single benefit of the doubt. In the FELA cases, these cases are more stringent.

THE COURT: Well, they are more stringent in some areas, but neglience is negligence.

MR. KATZ: That is true.

THE COURT: And you still have to meet the burden of negligence. Now, they have some stringent aspects of it certainly. But the threshold of it is you have to show that the proximate cause of the accident was an act of the B&O Railroad, whether it was because the place in which he was working had something to do with it, or whatever. Or that they had [137] something to do, -- I think the issue here is whether or

not they had sufficient notice that somebody might, -- there is a lot of ifs, -- that somebody might be hit with a rock, providing the engineer goes through there and opens his window. And I think these are all the ifs you have in this particular case.

I am not suggesting anything one way or another, but this is what we are dealing with here. I don't think there is any evidence of anything on the locomotive itself which causes injury. At least, -- well, we don't know.

We don't know, and if you don't know, that's no evidence. We don't know, -- is it just as easy to -- if you want to surmise or make an educated guess as Mr. Mosco, -- he could have bumped his head, couldn't he? That is just as probable isn't it, as something being thrown?

MR. KATZ: No.

THE COURT: Why not? From the testimony in this case?

MR. KATZ: Because from the testimony in this case, he saw a blur of the object coming in from the outside into the engine and then immediately felt the impact.

THE COURT: Well, that is one version. Then [138] here are a couple of other versions where he said he didn't see anything. So, it depends on which version you want to take.

MR. KATZ: But isn't that the role of the jury Your Honor?

THE COURT: Oh, yes, I didn't say that wasn't the role of the jury. I said it depends on which version. I guess you could argue that he has given several versions. He has given a couple

of versions in writing, and then he gives his version in court, -- and of course, it is up to the jury how much credibility you give to that type of testimony.

But that doesn't go to negligence. Even with all that, where is the negligence?

MR. KATZ: Your Honor, the first reading of the Boiler Inspection Act,--

THE COURT: Well, there is just no evidence in that is it? I haven't seen any.

MR. KATZ: It was adduced during Mr. Mosco's testimony that in fact, the window itself had to remain open for him to properly perform his job, because of the distorting effect of the dirt on the window.

THE COURT: Well, was that the B&O Railroad's fault or his fault, because he didn't clean the window?

[139] MR. KATZ: Well, there is an engineering department and there is an equipment department.

THE COURT: Well, my recollection of the evidence was that he said he didn't have time to do it. He didn't fault anybody. He said he didn't have time. I guess you can infer from that that it was one of his responsibilities. He said he cleaned off the front windows and not the side.

I am not suggesting a whole lot in that but, the question is, whether or not that's -- you see, the safety act implied more than just dirty windows. It goes to a, -- the dirty windows did not cause this accident.

In most of the safety act provisions, something on the locomotive, parts or appurtenants caused the accident or played a very prominent part in this. The stone played the most prominent part, or whatever it was. Everybody is calling it a stone, you have me calling -- nobody knows what it was. Whatever it was played the pertinent part.

So there is a real serious question and maybe the jury, -- I don't know, maybe the jury, -- But on the safety act, you have an additional burden. You have to show that a part or appurtenant of this [140] locomotive was the cause of -- had something to do with this.

MR. KATZ: Your Honor, it is my understanding of the law is that our burden is to show that that part and

appurtenance played a part even in the slightest, in the happening, --

THE COURT: Yes, but what part are you talking about?

MR. KATZ: Well, certainly under the facts that are on the record at this time. If Mr. Mosco, under the operating conditions in which he was operating, had to leave the window open in order to properly operate, -- that you could properly find that the need to remove whatever minimal protection was provided by the railroad was created by an unsafe condition.

THE COURT: Oh, that is stretching it an awful lot. That is stretching it so far down the line Mr. Katz, that it almost breaks. I don't think the [Boiler Inspection Act], -- I don't think the Courts will bend the [A]ct to

that great extent. You are bending it way out of proportion.

I think if you look at that [Boiler Inspection Act], the sole purpose of that [A]ct was that if something on the train, in the locomotive breaks, falls apart, which causes [141] injury, -- for example, you get a lot of cases where the brakes jam and the people in the vehicle rush forward and strike their heads on, you know.

We have had some strange situations, but none of them that we have to take eight or nine but ifs to get there. And I think you need a lot of but ifs, to get there, which makes it so unreasonable that I think it stretches the [A]ct too far.

No, I think you are going to have to show more than that. I think under the

[A]ct itself, that safety act, you are going to have to show that it was something on the part or appurtenant, which is really what the [A]ct says, that caused him to be injured.

And the window didn't cause him to be injured. The fact that the window was open, perhaps was the cause of something coming through, but that didn't cause the injury. Whatever hit him caused the injury. And that had nothing to do with any part of appurtenants on the train. It is the act of a third party or third thing or an unknown depends on how the jury perceives it.

No, I don't have any doubt in my mind. There is no evidence at all of this [A]ct. And even if you talk about all the other things which I think you

attempted to talk about, you still wouldn't meet this [142] [A]ct, woul [sic] meet the burden under this [A]ct. Because it gives you sort of an absolute liability. And when there is absolute liability, you have got to show clearly that it was a part or appurtenance of the thing which caused the injury. And that is what it does.

No, I will have to grant the motion on that second phase on the safety act.

MR. KATZ: If it please Your Honor, I except --

THE COURT: Well, you always have an exception anyway. I grant the motion.

All right, now on the other.

MR. KATZ: Under the Federal Employees Liability Act, the Courts, including our Supreme Court, has granted

us broad discretion to use circumstantial evidence. I think that the evidence in this case, and all of the inferences that can be made from it, and all of the intelligent inferences that are permissible from it, certainly creates a case by which the jury, --

THE COURT: Mr. Katz, don't you have to draw, -- in circumstantial evidence don't you have to draw, -- you can only use it from known facts or circumstances. You can't draw an inference from a supposition or a possibility or a speculative fact. It must be a known fact for which there are [143] circumstances surrounding it. That is my understanding of circumstantial evidence; that you must have some facts, and they must be proven facts, from which the circumstances, --

and you must prove your facts by -- you have to prove your facts at this point. The facts must be proven.

And from those facts, and each fact doesn't have to add up certainly to negligence, but there must at least be some facts which amount to, if you put them all together. And when you put them all together, then they must establish, -- at this point, sort of a prima facie case on your part. And that is, I think, what we have to deal with now.

MR. KATZ: In this case Your Honor, --

THE COURT: Well, what are the facts?

MR. KATZ: In this case Your Honor, the evidence shows rather clearly that several prior incidents of individuals

throwing objects at locomotive trains occurred at this precise location. The evidence shows that many of these situations occurred from the embankment area.

The evidence shows that at the time of this accident, an object came from the area of the embankment.

THE COURT: Well, I don't believe that to be [144] the evidence Mr. Katz. I believe you tried to get that evidence in, but the only thing -- Mr. Katz, I stopped Mr. Mosco, because he said at one time, -- he didn't know what hit him or where it came from. Then I think on cross examination or redirect, you attempted to get him to say that it came from the embankment area.

I think at one point he said that he might have thrown things, or that

children might have been at the embankment area, but I think in this case, the evidence is -- his testimony is I think on cross examination, -- he said he didn't know where it came from. That was his testimony.

MR. KATZ: Your Honor, on redirect examination, in relation to the entire area which he described to the jury, -- he testified where that originated from. He testified, from the embankment.

THE COURT: Well, I didn't permit that Mr. Katz. You must remember I said that, I stopped you because it was purely and simply against, -- on his part he had no basis for which to make that statement, and he said so, many times. And I think you were attempting to try to fill it in.

But he said, without any question in cross examination, and I believe on

direct, he didn't know [145] where this came from. And I think that is consistent not only with those statements, but it is consistent with the reports and other statements, -- all of them say he didn't know what hit him. And he never said where it came from.

I think what happened is, we are now trying to establish negligence by what happened some other time. You don't do it that way. The only reason that you would have that is to show that the railroad should have had knowledge that maybe this is a troublesome area, and that they should have taken some precaution perhaps to protect the train.

But then you have got a next step, you have to go with, what protection should they have taken with the train that they hadn't already provided. And

if you can show what they didn't do, and you show that that was a negligent act, -- then perhaps that's how you reach negligence in this type of case. And that's the whole question here.

I will tell you, -- the issue here, there is some evidence, -- you have presented evidence that, -- by some people that they throw stones here in this area, -- good or bad. I mean, it is not the best area for the trains to run. And I think Mr. Mosco said so, and a couple of other people. But then he said it was not. [146] Well, he didn't say that, but there is a statement which was purportedly given by him, -- he said, he didn't say that part, but he signed it, -- and the jury can believe it or not believe it. If they believe it, then they can discount which ever one they believe.

No, I think what I am going to do in this case, -- I think this is the kind of case, I will have to reserve on this. Because I am not one hundred percent happy with what amounts to negligence in this case, because I fail to see it as clearly as maybe I might. But then I think there is some evidence which I think the jury ought to look at, to see whether they agree or disagree. I think I am going to reserve on it, and therefore, I am going to require the defendant to put his case on.

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THE FEDERAL RAILROAD ADMINISTRATION'S
SAFETY GLAZING STANDARDS

FRA Definitions

* * *

(h) "Windshield" means the combination of individual units of glazing material of the locomotive, passenger car, or caboose that are positioned in an end facing glazing location.

(i) "End facing glazing location" means any location where a line perpendicular to the plane of the glazing material makes a horizontal angle of 50 degrees or less with the centerline of the locomotive, caboose or passenger car. Any location which, due to curvature of the glazing material, can meet the criteria for either a front facing location or a side facing location shall be considered a front facing location.

(j) "Side facing glazing location" means any location where a line perpendicular to the plane for the glazing material makes an angle of more than 50 degrees with the centerline of the locomotive, caboose or passenger car.

(k) "Certified glazing" means a glazing material that has been certified by the manufacturer as having met the testing requirements

set forth in Appendix A of this part and that has been installed in such a manner that it will perform its intended function.

(l) "Emergency opening window" means that segment of a side facing glazing location which has been designed to permit rapid and easy removal during a crisis situation.

* * *

(n) "Locomotive cab" means that portion of the superstructure designed to be occupied by the crew while operating the locomotive.

49 C.F.R. §223.5.

FRA Glazing Regulations

Subpart B--Specific Requirements

§223.9 Requirements for new or rebuilt equipment.

(a) Locomotives, including yard locomotives, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all locomotive cab windows.

(b) Cabooses, including yard cabooses, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows.

(c) Passenger cars, including self-propelled passenger cars, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows and at least four emergency opening windows.

49 C.F.R. §223.9.

§223.11 Requirements for existing locomotives.

(a) Locomotives, other than yard locomotives, built or rebuilt prior to July 1, 1980, which are equipped in the forward and rearward end facing glazing locations of the locomotive cab windshield with a glazing material that meets the criteria for either portion of the impact testing required for a Type I test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the windshield location except to replace windshield glazing material that is broken or damaged.

(b) Locomotives, other than yard locomotives, built or rebuilt prior to July 1, 1980, which are equipped in all locomotive cab side facing glazing locations with a glazing material that meets the criteria for either portion of the impact testing required for a Type II test under th provisions of

Appendix A of this part, will not require the installation of certified glazing in the sidefacing glazing location except to replace sidefacing glazing material that is broken or damaged.

(c) Except for yard locomotives and locomotives equipped as described in paragraphs (a) and (b), of this section, locomotives built or rebuilt prior to July 1, 1980, shall be equipped with certified glazing in all locomotive cab windows after June 30, 1984.

(d) Each locomotive subject to the provisions of paragraph (c) of this section which, as a result of an act of vandalism has a locomotive cab window that is broken or damaged so that the window fails to permit good visibility --

(1) Shall be placed in Designated Service within 48 hours of the time of breakage or damage or

(2) Shall be removed from service until equipped with certified glazing in the following manner:

(i) If the broken or damaged window is a part of the windshield of the locomotive cab, all of the forward and rearward end

facing glazing locations of the locomotive cab must be replaced with certified glazing.

(ii) If the broken or damaged window is a part of the sidefacing window of the locomotive cab, all of the sidefacing glazing locations of the locomotive cab must be replaced with certified glazing.

49 C.F.R. §223.11.

Appendix A--Certification Of Glazing Materials

As provided in this part, certified glazing materials installed in locomotives, passenger cars, or cabooses must be certified by the glazing manufacturer in accordance with the following procedures:

a. General Requirements

(1) Each manufacturer that provides glazing materials, intended by the manufacturer for use in achieving compliance with the requirements of this part, shall certify that each type of glazing material being supplied for this purpose has been successfully tested in accordance with this appendix and that test verification data is available to a railroad or to FRA upon request.

(2) The test verification data shall contain all pertinent original data logs and documentation that the selection of material samples, test set-ups, test measuring devices, and test procedures were performed by qualified personnel using recognized and acceptable practices and in accordance with this appendix.

b. Testing Requirements

(1) The material to be tested (Target Material) shall be a full scale sample of the largest dimension intended to be produced and installed.

(2) The Target Material shall be representative of production material and shall be selected on a documented random choice basis.

(3) The Target Material shall be securely and rigidly attached in a fixture so that the fixture's own characteristics will not induce test errors.

(4) The Target Material so selected and attached shall constitute a Test Specimen.

(5) The Test Specimen will then be equipped with a Witness Plate that shall be mounted parallel to and at a distance of

six inches in back of the Target Material. The Witness Plate shall have at least an area which will cover the full map of the Target Material.

(6) The Witness Plate shall be an unbacked sheet of maximum 0.006 inch, alloy 1100 temper O, aluminium stretched frame to provide a taut surface.

(7) The Test Specimen will be positioned so that the defined projectile impacts it at an angle of 90 degrees to the Test Specimen surface.

(8) The point of impact of the defined projectile will be within a radius of 3" of the centroid of the Target Material.

(9) Velocity screens or other suitable velocity measuring devices will be positioned so as to measure the impact velocity of the defined projectile within a 10% accuracy tolerance, with test modifications made to guarantee that the stipulated minimum velocity requirements are met.

(10) The Test Specimen for glazing material that is intended for use in end facing glazing locations shall be subjected to a Type I test regimen consisting of the following tests:

(i) Ballistic Impact in which a standard 22 caliber long rifle lead bullet of 40 grains in weight impacts at a minimum of 960 feet per second velocity.

(ii) Large Object Impact in which a cinder block of 24 lbs minimum weight with dimensions of 8 inches by 8 inches by 16 inches nominally impacts at a corner of the block at a minimum of 44 feet per second velocity. The cinder block must be of composition referenced in American Society for Testing and Materials (ASTM) Specification C33L or ASTM C90.

(11) The Test Specimen for glazing material that is intended for use only in side facing glazing locations shall be subjected to a Type II test regimen consisting of the following tests:

(i) Ballistic Impact in which a standard 22 caliber long rifle lead bullet of 40 grains in weight impacts at a minimum of 960 feet per second velocity.

(ii) Large Object Impact in which a cinder block of 24 lbs minimum weight with dimension of 8 inches by 8 inches by 16 inches nominally impacts at the corner of the block at a minimum of 12 feet per second velocity. The cinder

block must be of the composition referenced in ASTM C33L or ASTM C90.

(12) Three different test specimens must be subjected to the ballistic impact portion of these tests.

(13) Two different test specimens must be subjected to the large object impact portion of these tests.

(14) A material so tested must perform so that:

(i) there shall be no penetration of the back surfaces (side closest to Witness Plate) of the Target Material by the projectile. Partial penetration of the impact (front) surface of the Target Material does not constitute a failure; and

(ii) there shall be no penetration of particles from the back side of the Target Material through the back side of the prescribed Witness Plate.

(15) Test specimens must consecutively pass the required number of tests at the required minimum velocities. Individual tests resulting in failures at greater than the required minimum velocities may be repeated but a failure of an individual test at

less than the minimum velocity shall result in termination of the total test and failure of the material.

(16) After successful completion of the prescribed set of required consecutive tests, a manufacturer may certify in writing that a particular glazing material meets the requirements of these standards.

c. Material Identification

(1) Each individual unit of glazing material shall be permanently marked, prior to installation, to indicate that this type of material has been successfully tested as set forth in this appendix and that marking shall be done in such a manner that it is clearly visible after the material has been installed.

(2) Each individual unit of a glazing material that has successfully passed the Type I testing regimen shall be marked to indicate:

(i) "FRA Type I" material;

(ii) the manufacturer of the material;

(iii) the type or brand identification of the material.

Appendix to 49 C.F.R. §§221.1 - 223.17

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